Filed 11/2/09 In re Smith CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

IN RE LINDA LEE SMITH, ON HABEAS CORPUS.	2D CIVIL NO. B213431 (SUPER. CT. NO. CR11181) (SAN LUIS OBISPO COUNTY)

Governor Arnold Schwarzenegger appeals from the superior court's order granting respondent Linda Lee Smith's petition for writ of habeas corpus and vacating the Governor's 2007 decision to reverse the 2007 determination by the Board of Parole Hearings (Board) that she is suitable for parole. (Pen.Code, § 1507.) We reverse the superior court's order because some evidence supports the Governor's conclusion that respondent is unsuitable for parole because she is currently dangerous. That evidence consists of (1) the aggravated circumstances of the commitment offense, and (2) respondent's lack of insight into her criminal behavior and failure to take responsibility for her past violent conduct.

This is the Governor's second appeal in this matter. In February 2009 we reversed the same superior court's order granting respondent's petition for writ of habeas corpus and vacating the Governor's 2006 decision to reverse the Board's 2006 determination that she is suitable for parole. (*In re Smith* (2009) 171 Cal.App.4th 1631 (*Smith*).) The order from which the Governor is presently appealing was made in December 2008, before the filing of our prior opinion.

Factual and Procedural Background

We set forth the relevant factual and procedural background from our prior opinion. We then discuss additional matters pertaining to the present appeal.

Prior Opinion

"In 1980 respondent was convicted by a jury of second degree murder. Our Supreme Court reversed the conviction because the trial court had erroneously given a felony-murder instruction. (*People v. Smith* (1984) 35 Cal.3d 798, 801, 808 . . . .) In its opinion, the Supreme Court summarized the facts as follows:

" '[Respondent] and her two daughters, three-and-a-half-year-old Bethany (Beth) and two-year-old Amy, lived with David Foster. On the day Amy died, she refused to sit on the couch instead of the floor to eat a snack. [Respondent] became angry, took Amy into the children's bedroom, spanked her and slapped her in the face. Amy then went towards the corner of the bedroom which was often used for discipline; [respondent] hit her repeatedly, knocking her to the floor. Foster then apparently joined [respondent] to "assist" in Amy's discipline. Beth testified that both Foster and [respondent] were striking Amy, who at that point had been at least partially undressed by [respondent]. [Respondent] and Foster used both their hands and a paddle on the child, and were also biting her. In addition, Beth testified that Foster put a wastebasket on Amy's head and hit her on the head with his fist. Eventually, [respondent] knocked the child backwards and she fell, hitting her head on the closet door.

" 'Amy stiffened and went into respiratory arrest. [Respondent] and Foster took her to the hospital, where [respondent] admitted that she "beat her too hard." She also stated that Foster had not come home until after the incident. Amy died that evening. Her injuries were consistent with compressive force caused by numerous blows by hands, fists, and a paddle. The severe head injury that was the direct cause of death occurred within an hour before the child was brought to the hospital.

" '[Respondent] testified that although she had spanked Amy on the day in question, she then left Amy in the children's room. Foster, believing additional discipline was warranted, went into the room, closed the door and began shouting at Amy.

Although [respondent] heard thumping noises, she was not overly concerned because Foster had behaved similarly in the past and Amy had not been injured. After a half hour, [respondent] became somewhat worried and entered the room. She observed that Amy had a puffy lip, and bite marks and bruises all over her lower body. Foster left the room at [respondent's] request after [respondent] said she would continue the discipline. [Respondent] then shouted at Amy for 15 to 20 minutes to allow Foster time to "cool off." To avoid the possibility that Foster might also attack Beth, she took Beth into another bedroom and closed the door. Foster returned to the children's room and began slapping Amy because she would not look at him. [Respondent] testified she was afraid that if she interfered she would become the object of Foster's attack. She stated that although she realized that Amy was being abused, she did not believe the child's life was in danger. [Respondent] eventually did intervene, at which point Amy stiffened and fainted. [Respondent] expressed a desire to take the child to hospital, but Foster objected because of his concern about the possible effect on his probation status. [Respondent] therefore agreed to take all responsibility for Amy's injuries and initially did so in her statement at the hospital. As noted above, however, [respondent] later denied any active involvement in the beating that led to Amy's death.' (*People v. Smith, supra,* 35 Cal.3d at pp. 801-802 . . . , fn. omitted.)

"Following retrial, a jury again convicted respondent of second degree murder. She was sentenced to prison for 15 years to life.

"At a parole consideration hearing, conducted in March 2006, the Board . . . decided for the seventh time that [respondent] should be granted parole. [Fn. omitted.] For the seventh time, the Governor reversed the Board's decision.

"At the March 2006 hearing as well as prior parole consideration hearings, respondent's version of events was as follows: The beating was triggered by an incident during which Amy 'cried because the pet duck wanted to eat her pancake and she refused to get up on the couch where the duck couldn't reach the pancake.' Respondent did not participate in the beating. All of the blows were struck by Foster. Nor did respondent bite Amy: 'I did not make those bite marks, I did not beat her.' Earlier that day,

respondent had merely spanked Amy on the buttocks with her hand and 'a hollow, lightweight' plastic paddle. Nevertheless, respondent accepted responsibility for Amy's death because she had failed to protect her from Foster's physical abuse.

"At a parole consideration hearing conducted in October 2002, respondent said that, following her arrest, she had made 'a very long confession' to the police. That confession was the basis for the Supreme Court's statement of facts portraying her as the initiator and chief perpetrator of the violent acts committed against Amy. Respondent explained that she had made the confession because she had told Foster that she would take the blame and because she 'was finally trying to protect [her] children.' A commissioner asked her why he should believe her present version of events instead of her confession. Respondent replied: 'Because I'm telling you the truth to the best of my ability. . . . I know, in my heart of heart, I did not inflict the blows that cost Amy her life. But I also know, in my heart of heart, I didn't stop it either.'

"Respondent's most recent psychological evaluation, dated January 23, 2006, noted: '[Respondent] states that she has no intention to minimize her responsibility for Amy's death, but she is clear in her assertion that she did not inflict any harm on Amy leading to the child's death on the day [the] incident occurred.' '[Respondent] accepts full responsibility for the death of her daughter because she believes that she should have protected her children by ending the relationship with David [Foster] once she realized that he was abusive and harmful toward her daughters.' " (*Smith*, *supra*, 171 Cal.App.4th at pp. 1633-1635.)

Additional Matters Pertaining to the Present Appeal

In March 2007 the Board conducted a subsequent parole consideration hearing. (7CT 1569) At this hearing respondent's description of the commitment offense was consistent with her description at previous Board hearings. Respondent insisted that she "did not hit Amy in a way to cause injuries to her." (7CT 1592) Respondent declared, "I spanked [Amy] with a little plastic paddle because it made a loud sound and . . . my criterion then was I would never spank my child hard enough to leave a bruise." (7CT 1593) Respondent's daughter, Bethany, spoke at the hearing and supported her mother's

version of events. For the eighth time, the Board decided that respondent should be granted parole.

In reviewing the Board's 2007 decision to grant parole, the Governor noted that "various positive factors" supported respondent's release from prison: "[Respondent] maintained a discipline-free prison misconduct record, and she continues to make efforts to enhance her ability to function within the law upon her release. She earned an Associate of Arts degree in 1982 and a Bachelor of Science degree in 1989. She also completed Theological Seminary courses. She completed vocational training in graphic arts work, and she is a certified tutor for Chaffey College. She held institutional jobs such as peer-helper, college tutor, janitor, dishwasher, cook, server, library aide, painting instructor, recreation aide, and clerk. She availed herself of an array of self-help and therapy, including individual psychotherapy, 12-step Codependency Program, Substance Abuse Therapy, Victim Impact Orientation Program, Issues with Children Group, and Friends Outside Parenting Program. Additionally, [respondent] received favorable evaluations from various correctional and mental-health professionals over the years. She also maintains some supportive ties with family, including her surviving daughtyer. In addition, she also made plans upon her release to live with her parents in San Luis Obispo County, her county of last legal residence. She also made plans to work for a technology company upon her release."

Despite these positive factors, the Governor concluded: "The nature and circumstances of this crime would alone be enough for me to again conclude that [respondent's] release from prison would pose an unreasonable public-safety risk." The Governor declared: "[T]he second-degree murder for which [respondent] was convicted was especially atrocious and cruel because she abused her vulnerable, two-year-old daughter over an extended period of time and allowed her boyfriend to do the same. [Respondent's] actions demonstrated an exceptionally callous disregard for Amy's suffering and life. Furthermore, the reason for Amy's 'punishment' -- her refusal to sit on the couch to eat a snack -- is exceedingly trivial in relation to the 30 to 45 minute beating that Amy endured. Although [respondent's] eldest daughter indicated to the 2007 Board

that [respondent] did not assist her boyfriend in Amy's fatal beating, according to the California Supreme Court's opinion in this case, the eldest daughter testified at trial that she saw both her mother and her mother's boyfriend striking and biting Amy. She also testified that she saw a wastebasket put over Amy's head, and the wastebasket was then punched repeatedly. The coroner's report noted that Amy was a victim of battered child syndrome, and that the autopsy findings concluded that her death was caused by trauma to her head, which resulted in a brain contusion. The coroner's report also identified more than 80 bruises and injuries to Amy's 35-pound body, including bite marks on her buttocks, and numerous blunt injuries to her head, neck, chest, back, and extremities, which were all a deep bluish-red color. At [respondent's] sentencing hearing, the Chief Deputy District Attorney noted that '[t]his is probably one of the worse [sic], most aggravated murder cases . . . that involved a child that was beaten to death and tortured.' "

As part of the nature and circumstances of the crime, the Governor also considered that (1) "the 2007 Board concluded, 'we do not feel . . . that stress was a part of the commitment of this offense,' " and (2) "the Board said, '[n]or do we feel that you were a victim of what is now referred to as intimate battery syndrome [sic] as well . . . .' "

The nature and circumstances of respondent's crime were not the only reasons why the Governor found her unsuitable for parole. The Governor also considered respondent's refusal to acknowledge her participation in the beating: "I am concerned by [respondent's] attempts to minimize her role in the crime. . . . [Respondent] appears to believe that she carries a reduced culpability for this murder because her abuse of Amy was not administered as forcefully as her boyfriend's or did not last as long. . . . [S]he told the 2007 Board, 'I did not hit Amy in a way to cause injuries to her.' . . . In relation to her boyfriend's conduct, [respondent] told the 2004 Board that her 'punishment [of Amy] wasn't as severe as [her boyfriend's].' Additionally, she said his conduct was 'above and beyond anything I thought was acceptable . . . .' She also told the 2006 Board, 'I had some standards at that time.' But despite her boyfriend's involvement in Amy's abuse, the

evidence shows [respondent] allowed it to occur, and that she also participated on some level."

The Governor concluded: "[A]fter carefully considering the very same factors the Board must consider, I find that the gravity of the murder and [respondent's] apparent failure to fully appreciate the nature and magnitude of her offense presently outweigh the positive factors. According, because I believe her release would pose an unreasonable risk of danger to society at this time, I REVERSE the Board's 2007 decision to grant parole to [respondent]."

Standard of Review

"[T]he Governor undertakes an independent, de novo review of the inmate's suitability for parole. [Citation.]" (*In re Lawrence* (2008) 44 Cal.4th 1181, 1204.) The Governor "must consider all relevant statutory factors, including those that relate to postconviction conduct and rehabilitation. [Citation.]" (***Id.***, at p. 1219.)

In reviewing the Governor's decision to reverse the Board's determination that an inmate is suitable for parole, the standard of review is "whether 'some evidence' supports the conclusion that the inmate is unsuitable for parole because he or she currently is dangerous." (*In re Lawrence, supra,* 44 Cal.4th at p. 1191.) "[A]lthough . . . the Governor may rely upon the aggravated circumstances of the commitment offense as a basis for a decision denying parole, the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre- or post-incarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety." (***Id.***, at p. 1214.)

"Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of the Governor. As with the discretion exercised by the Board in making its decision, the precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion

of the Governor, but the decision must reflect an individualized consideration of the specified criteria and cannot be arbitrary or capricious.[1] It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole." (*In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 677.)

Some Evidence Supports the Conclusion that Respondent Is Unsuitable for Parole Because She Is Currently Dangerous

We incorporate the following portions of the legal discussion from our prior opinion:

"Based on *In re Shaputis* (2008) 44 Cal.4th 1241 . . . (*Shaputis*), we conclude that some evidence supports the Governor's conclusion that respondent is unsuitable for parole because she is currently dangerous. Shaputis killed his wife by shooting her in the neck at close range. He was convicted of second degree murder and sentenced to prison for 15 years to life. The Board found Shaputis suitable for parole and set a parole date.

---

[1] "According to the applicable regulation, circumstances tending to establish unsuitability for parole are that the prisoner (1) committed the offense in an especially heinous, atrocious, or cruel manner; (2) possesses a previous record of violence; (3) has an unstable social history; (4) previously has sexually assaulted another individual in a sadistic manner; (5) has a lengthy history of severe mental problems related to the offense; and (6) has engaged in serious misconduct while in prison. [Citation.] [¶] The regulation further provides that circumstances tending to establish suitability for parole are that the prisoner: (1) does not possess a record of violent crime committed while a juvenile; (2) has a stable social history; (3) has shown signs of remorse; (4) committed the crime as the result of significant stress in his life, especially if the stress has built over a long period of time; (5) committed the criminal offense as a result of battered woman syndrome; (6) lacks any significant history of violent crime; (7) is of an age that reduces the probability of recidivism; (8) has made realistic plans for release or has developed marketable skills that can be put to use upon release; and (9) has engaged in institutional activities that indicate an enhanced ability to function within the law upon release. [Citation.]" (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 653-654, fn. omitted.)

"The Governor reversed the Board's decision 'because he concluded [Shaputis] posed an unreasonable risk of danger to society if released. The Governor's decision relied upon two grounds: (1) the crime was especially aggravated because it involved some premeditation, and (2) [Shaputis] had not fully accepted responsibility for, and lacked sufficient insight concerning, his conduct toward the victim.' (*Shaputis, supra,* 44 Cal.4th at p. 1253 . . . .)

"Our Supreme Court upheld the Governor's reversal 'because of the aggravated circumstances of [Shaputis's] commitment offense and "his lack of insight into the murder and the abuse of his wife and family." ' (*Shaputis, supra,* 44 Cal.4th at p. 1255 . . . .) Although the evidence indicated that Shaputis had intentionally killed his wife, he consistently claimed that the shooting was an accident. The Supreme Court concluded that 'the Governor's reliance on [Shaputis's] lack of insight is amply supported by the record - both in [Shaputis's] own statements at his parole hearing characterizing the commitment offense as an accident and minimizing his responsibility for the years of violence he inflicted on his family, and in recent psychological evaluations noting [Shaputis's] reduced ability to achieve self-awareness.' (*Id.,* at p. 1260, fn. 18 . . . . .)

"In reversing the Board's decision to grant respondent parole, the Governor here relied on grounds similar to those that he had relied on in *Shaputis:* (1) the aggravated circumstances of the crime, and (2) respondent's lack of insight into her conduct and refusal to accept responsibility for her participation in the beating of Amy. The circumstances of respondent's crime are far more aggravated than the circumstances of Shaputis's crime. Shaputis killed his wife by a single gunshot wound to the neck. According to respondent's confession and Bethany's testimony at the original trial, respondent personally attacked Amy over a period of 30 to 45 minutes. Amy must have suffered horribly during the attack, which was triggered by a trivial incident. Moreover, unlike Shaputis's wife, Amy was particularly vulnerable because she was only two years old.

"Just as Shaputis insisted that the shooting of his wife was an accident, so has respondent continued to claim that she neither struck nor bit Amy. Respondent expressed

remorse for not preventing Foster from beating Amy to death. She never expressed any remorse for her personal participation in that beating. . . . Thus, as in *Shaputis*, the record supports the conclusion that respondent 'has failed to gain insight or understanding into either [her] violent conduct or [her] commission of the commitment offense.' (*Shaputis, supra,* 44 Cal.4th at p. 1260 . . . .)

"In *Shaputis* our Supreme Court noted that 'the Governor's decision is supported by some evidence - not merely because the crime was particularly egregious, but because [Shaputis's] failure to take full responsibility for past violence, and his lack of insight into his behavior, establish that the circumstances of [Shaputis's] crime and violent background *continue* to be probative to the issue of his *current* dangerousness.' (*Shaputis, supra*, 44 Cal.4th at p. 1261, fn. 20 . . . .) The 'violent background' referred to in this quotation consisted of Shaputis's 'long history of domestic violence.' (*Shaputis, supra,* 44 Cal.4th at p. 1253 . . . .) Unlike Shaputis, respondent does not have a violent background. The Governor observed that respondent 'had no documented history of assaultive or violent behavior, or any criminal record at all, when Amy was murdered.'

"Respondent's lack of a violent background is not a valid distinction between the instant case and *Shaputis.* The gravity of respondent's commitment offense has continuing predictive value as to current dangerousness in view of her lack of insight into her behavior and refusal to accept responsibility for her personal participation in the beating of Amy. '[A]s established in . . . [*Shaputis*], . . . the Governor does not act arbitrarily or capriciously in reversing a grant of parole when evidence in the record supports the conclusion that the circumstances of the crime continue to be predictive of current dangerousness despite an inmate's discipline-free record during incarceration. As explained in detail in that case, where the record also contains evidence demonstrating that the inmate lacks insight into his or her commitment offense or previous acts of violence, even after rehabilitative programming tailored to addressing the issues that led to commission of the offense, the aggravated circumstances of the crime reliably may continue to predict current dangerousness even after many years of incarceration.

[Citations.]' (*In re Lawrence, supra,* 44 Cal.4th at p. 1228 . . . .)" (*Smith, supra*, 171 Cal.App.4th at pp. 1637-1639.)

In the present appeal, respondent contends that the Governor's belief that she participated in Amy's beating is "unfounded" because it is "based on unreliable and recanted statements." Respondent explains: "[T]he Governor has insisted on a version of the crime that is supported by only two statements in the record, both of which have been recanted and utterly discredited: (1) [respondent's] statements, on the day of the crime, that she alone was responsible for beating Amy, which [respondent] made in order to convince [Foster] to take Amy to the hospital . . . ; and (2) Bethany's statements at [respondent's] first trial that she saw both her mother and Foster beating and biting Amy."

Respondent in effect is asking us to reject our Supreme Court's direction that "[r]esolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of the Governor." (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 677.) Based on the statements respondent made immediately after the commission of the crime, the Governor reasonably concluded that she had participated in the beating and had not been a mere bystander to a beating perpetrated by Foster alone. According to the Board's 2007 report, upon arriving at the hospital emergency room, respondent told a nurse: " 'I think I beat her to death. I just keep beating her, I just keep beating her over and over.' " In the unpublished opinion affirming respondent's reconviction of second degree murder, this court summarized respondent's statements as follows: "At the hospital, [respondent] told the emergency room nurse and the attending pediatrician that she had beaten Amy and that the child had hit the wall and fallen down. [Respondent] also told Police Officer Silva that she had bitten Amy the previous day to teach her not to bite people, and, to discipline her for deliberately disobeying [respondent] for the previous several days, she had spanked Amy's rear and face with her hand, struck her on top of the head, knocked her down five or six times, and picked her up and shook her after Amy hit her head on the floor and closet door." (*People v. Smith* (Mar. 18, 1987, B011393) slip opinion, pp. 2-3.)

Bethany's testimony during the first trial corroborated respondent's statements that she had beaten Amy. The Governor was entitled to find that respondent's and Bethany's later recantations were not credible. In *In re Tripp* (2007) 150 Cal.App.4th 306, 318, the appellate court observed: "Although the Governor simply reviewed the documents before the Board, he was free to make his own credibility determinations. If he had chosen to disbelieve petitioner, we would be bound by that determination." (See also *People v. Cuevas* (1995) 12 Cal.4th 252, 276-277 [witnesses' out-of-court statements identifying defendant as shooter constituted substantial evidence of guilt even though they recanted statements at trial].)

Respondent claims that the Governor impermissibly required her "to change her story to fit [his] unfounded belief . . . about what happened on the day of the crime." Respondent correctly notes that "parole cannot be conditioned upon an admission of guilt to a certain version of the crime." (See Pen. Code, § 5011, subd. (b) [Board "shall not require, when setting parole dates, an admission of guilt to any crime for which an inmate was committed"].) Respondent mischaracterizes the Governor's decision. He did not require her to admit that she had beaten Amy. Instead, he properly considered her attempt to minimize her role in the crime as showing a lack of insight and a failure to take responsibility for her actions. (See Cal.Code Regs., tit. 15, § 2402, subd. (b) ["All relevant, reliable information available to the panel," including the prisoner's "past and present attitude toward the crime," "shall be considered in determining suitability for parole"]; *In re Lazor* (2009) 172 Cal.App.4th 1185, 1202, fn. 13 ["Consideration of whether an inmate accepts responsibility for commitment offense does not conflict with [Penal Code] section 5011, subdivision (b)"].)

Respondent contends that the evidence shows that she has insight into her crime and has taken responsibility for her actions. (AOB 27-36) But the evidence does not preclude a reasonable inference to the contrary. During the 2007 parole consideration hearing, a commissioner asked respondent if she had "insight as to [her] crime." Respondent replied, "Yes, I do," and the commissioner asked her to "describe [her] insight." Respondent declared: "This sounds horrible. I believe that he [Foster] just

couldn't stand that Amy loved me and that I loved her and that we didn't - - there was some sort of division he was trying to make there. And I know from my perspective, with my immaturity, my self-centeredness, my lack of understanding and confusion that came from the child sexual abuse I had . . . experienced,[2] that I was looking for somebody to take responsibility off my shoulders and abdicated my responsibility totally and found somebody who was just willing to take that over." In other words, respondent's insight into her crime consisted of the realization that her boyfriend was jealous of her relationship with Amy and that she had "abdicated" her parental responsibility to him. The Governor could have reasonably concluded that respondent's purported "insight" actually showed a lack of insight into her crime. She blamed herself for a mere passive abdication of responsibility. She blamed Foster for Amy's beating without acknowledging that she had actively participated in it or had aided or abetted it. (See *In re Rozzo* (2009) 172 Cal.App.4th 40, 61 ["Rozzo's claim that he 'did not participate in the murder,' indicates that Rozzo lacks insight into the reasons he committed the murder"].)

Respondent contends that her due process rights have been violated because "the Governor's decision wholly fails to give [her] an individualized consideration of the requisite factors. The decision glaringly omits any mention of the numerous evaluations by psychiatrists and correctional counselors, extending as far back as 1986, which opine that [respondent] has achieved mature insight into her crime, accepts responsibility for her crime, expresses genuine remorse, and no longer presents an unreasonable risk of danger to society." But the Governor's decision states that, as one of the "positive factors" supporting respondent's release on parole, he considered that she had "received favorable evaluations from various correctional and mental-health professionals over the years." The Governor was not required to discuss these evaluations in greater detail, nor

[2] During the 2006 parole consideration hearing, the Board noted that respondent had "stated that when she was about 12 years old her father on numerous occasions exposed himself to her. This continued until she was about 16 years old."

was he bound by the opinions expressed therein: " '[T]he Governor . . . has broad discretion to disagree with his State's forensic psychologists . . . .' " (*In re Rozzo*, *supra*, 172 Cal.App.4th at p. 62.)

Disposition

The superior court's order granting the petition for writ of habeas corpus is reversed. The Governor's 2007 decision, which reverses the Board's 2007 determination that respondent is suitable for parole, is reinstated.

NOT TO BE PUBLISHED.

YEGAN, Acting P.J.

I concur:

COFFEE, J.

PERREN, J. - DISSENTING

I respectfully dissent for the reasons set forth in my previous dissenting opinion. (*In re Smith* (2009) 171 Cal.App.4th 1631, 1640-1648.) And, like the majority, I add a few comments.

Reduced to its essence this case turns on the Governor's expressed concern over Ms. Smith's attempts to minimize her role in the crime and her purported intransigence in failing to "fully appreciate the nature and magnitude of her offense."[1] My colleagues cite to the Supreme Court's recitation of facts contained in its 1984 opinion and this court's 1987 opinion as evidence that Ms. Smith admitted responsibility for personally beating and striking her daughter. Those references, however, recount the statements made at the hospital and to the police. As appellant has repeatedly explained, she made these statements in order to get the child away from her boyfriend and to the emergency room for treatment. As she subsequently testified, her involvement, while inexcusable, did not involve inflicting blows on the child but were acts aimed at blunting the murderous rage of her boyfriend. (*People v. Smith* (1984) 35 Cal.3d 798, 802.)

As I noted in my earlier dissent and as the trial judge noted in his ruling and order on writ of habeas corpus, Ms. Smith has been relatively consistent in her retelling of the events at each of her parole hearings. The Governor, however, has characterized these statements as "attempts to minimize her role in the crime." From this the Governor concludes that Ms. Smith fails "to fully appreciate the nature and magnitude of her offense." This conclusion is belied by the findings of all hearing boards since 1991, and by every mental health professional and counselor who has dealt with her since 1986. (*In re Smith, supra*, 171 Cal.App.4th at p. 1642 (dis. opn. of Perren, J.).) Worse, this determination is the makeweight that the majority concludes provides the additional

[1] Governor's "Indeterminate Sentence Parole Release Review" (Pen. Code, § 3041.2) dated July 19, 2007.

factor which, when coupled with the incontestable facts of the severity of the crime, justify overruling the Board of Parole Hearings' (BPH) grant of parole.

It is unquestionably the prerogative of the Governor to select facts supported by the record. Having decided that the facts evidence Ms. Smith's complicity well beyond what she has testified to, the Governor extrapolates that she fails to appreciate the wrongfulness of her conduct. While the Governor may pick his facts, the conclusion he draws must also be supported. Here it is not. The mental health professionals without exception disagree with him.

"Thus, where there is 'unanimous clinical evidence' showing that the prisoner is not a danger to society and has insight and understanding of her behavior, neither the BPH nor the Governor has 'some evidence' to find to the contrary. (*In re Roderick* (2007) 154 Cal.App.4th 242, 272; see also *In re Lawrence* [2008] 44 Cal.4th [1181,] 1222-1223 [Governor's conclusion that petitioner showed insufficient remorse is unsupported when clearly contradicted by abundant evidence in the record].) This is just such a case." (*In re Smith, supra*, 171 Cal.App.4th at p. 1643 (dis. opn. of Perren, J.).)

In sum, the Governor's conclusion that Ms. Smith poses an unreasonable risk to society were she to be released hinges on her failure to repeat what she said at the emergency room. The formula is well stated by my colleagues and correctly relies upon *In re Lawrence*: the offense over time is not enough to deny parole based on a finding of current dangerousness. Another recognized factor must be stated. Here the additional factor is Ms. Smith's current "demeanor and mental state." The conundrum is evident: steadfast for over 20 years in her recounting of the circumstances of the offense, Ms. Smith must get her "mind right"[2] before she can be released. The Governor has repeatedly concluded that her current thinking makes her a danger to the community. Yet if she conforms her description to align with what she said at the emergency room, she will admit to what she has denied for over a score of years. Having thereby admitted not

[2] Captain, Road Prison 36 (Strother Martin) explains to "Luke" (Paul Newman) that punishment will end "cause you gonna get your mind right." (Cool Hand Luke, Warner Bros. (1967).)

only greater culpability but dishonesty as well, is she now to be considered less of a threat to public safety? She is in a room without doors.[3] In effect the Governor's reasoning denies her due process and converts her 15-years-to-life sentence to a sentence of life without the possibility of parole. (*In re Roderick, supra*, 154 Cal.App.4th at p. 276.)

The inexcusable and horrendous nature of this murder is beyond dispute. Yet even this crime is subject to the rules directing that parole shall be granted unless there is lawful reason to the contrary. (Pen. Code, § 3041, subd. (a); *In re Lawrence, supra,* 44 Cal.4th at p. 1212.) Here the only factor added to the indisputable heinousness of the crime is respondent's purported failure to appreciate the "nature and magnitude of her offense." The record is bereft of support for the Governor's conclusion; it is equally wanting for support in law or logic that Ms. Smith currently poses a danger to the public if released.

I would affirm the order directing respondent's release.

NOT TO BE PUBLISHED.

PERREN, J.

[3] The record on appeal reveals that Ms. Smith was found suitable for parole eight times since 1989. Since the filing of this appeal, the Board of Parole Hearings has twice granted her parole (2008 and 2009). The Governor has reversed the 2008 grant; the 2009 grant is currently under review.

Jac A. Crawford, Judge

Superior Court County of San Luis Obispo

Edmund G. Brown Jr., Attorney General, Julie L. Garland, Senior Assistant Attorney General, Heather Bushman, Supervising Deputy Attorney General, Kim Aarons, Deputy Attorney General, for Appellant.

Munger, Tolles & Olson; Blanca F. Young and Hailyn J. Chen, for Respondent. .